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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

ANTELOPE VALLEY
GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No.
40 v. Diamond Farming Co. Superior Court of
California County of Los Angeles, Case No. BC
325 201 Los Angeles County Waterworks
District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348Wm. Bolthouse
Farms, Inc. v. City of Lancaster Diamond
Farming Co. v. City of Lancaster Diamond
Farming Co. v. Palmdale Water Dist. Superior
Court of California, County of Riverside,
consolidated actions, Case No. RIC 353 840,
RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding
No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

JOINT CASE MANAGEMENT
CONFERENCE STATEMENT

Date: July 21, 2008
Time: 10:00 am
Dept: 1

(Counsel continued on next page)

JOINT CASE MANAGEMENT CONFERENCE STATEMENT

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On behalf of the above listed parties, AGWA hereby submits this joint Case Management
Conference Statement.

I. THE PARTIES REQUIRE CLARIFICATION AS TO THE PHASE II TRIAL

It is important to both the purveyors and the landowners alike to understand the issues, scope
and effect of the Phase II Trial. The Court has advised generally that Phase II Trial issues include
basin characteristics and safe yield. However, without a clear understanding of the causes of action
and claims being made by the purveyors and the specific characteristics of the Basin which the
purveyors intend to support such claims, it is difficult for the landowners to present meaningful and
cost effective evidence regarding characteristics of the basin. Depending upon the scope of inquiry
and the level of inquiry, shotgun analysis of the characteristics of the basin could take significant
time to accomplish. A great deal of judicial and party time and expense would be incurred in the
process.

To narrow the scope of inquiry, discovery is being served on the purveyors requesting they
identify what basin characteristics they rely upon to prove each of their claims and causes of action.

In addition to narrowing the focus of basin characteristics which will be litigated in Phase II,
it is essential to a meaningful Phase II Trial, and to succeeding phases, that both purveyors and
landowners understand the controlling California law which will apply to the determination of safe
yield and the proof of this quantity based upon the characteristics of the basin. Discovery is thus
being served on the purveyors to determine their contentions with regard to controlling California

1 case law setting forth the legal definition of safe yield and related concepts of surplus, temporary
2 surplus and overdraft.

3 While we believe that the majority of the parties agree as to the burden and standard of proof
4 in Phase II (discussed in section IV below). What is not clear given the posture of the case, is
5 precisely what characteristics of the basin the purveyors contend support their claims and the law
6 applicable to such claims, to determine whether proof is sufficient. For example, do the purveyors
7 contend that prescription will be proved based upon specific characteristics of the basin applicable to
8 a particular landowner, or applicable to a number of landowners based upon constructive notice
9 within a sub-basin, on the basis of constructive notice as to the characteristics of the basin as a
10 whole, or in some other manner? This contention must be known by overlying landowners to do
11 appropriate discovery and expert analysis and to prepare for trial.

12 In the absence of clarity regarding what a particular purveyor is intending and required to
13 prove, and without purveyor confirmation as to the characteristics of the basin which such purveyor
14 contends support its claims, it will be virtually impossible for the Court to determine whether proof
15 has been made by clear and convincing evidence and impossible for a reviewing Court to determine
16 whether such proof was made.

17 A trial in the absence of such clarity will leave landowners guessing what particular evidence
18 presented by the purveyors will be used for what particular proof of what particular claim and/or
19 cause of action in later phases of this litigation. In a more traditional civil litigation setting, the party
20 with the burden of proof would present its entire case before the responding party would present its
21 case. In this way, the proffered evidence, claims and causes of action are known and can be
22 meaningfully addressed with both evidence and legal analysis.

23 In order to protect due process concerns of the landowners against whom these claims are
24 being made, it is essential that the Court make clear that any proof by the purveyors of the
25 characteristics of the basin and any proof of safe yield or other Phase II issues, may be countered
26 with presentation of evidence by the landowners at any later phase of the proceedings. Failure to do
27 so will deprive landowners of the ability to evaluate all of the purveyors' evidence supporting each
28

1 and every cause of action and to present evidence in opposition to such causes of action. Failure to
2 do so will also deprive landowners of the ability to make appropriate procedural motions such as
3 motions for non-suit or directed verdict. The Court can protect these important defendant rights by
4 assuring that all Phase II proceedings are without prejudice to the defendant landowners' production
5 of evidence in later phases notwithstanding the fact that such evidence may provide different and/or
6 more focused information regarding basin characteristics.

7 In light of these concerns, we ask that the Court provide clarification on the topics discussed
8 below.

9 **II. SERVICE OF PROCESS AND SATISFACTION OF THE MCCARRAN ACT**

10 The Federal Government has asserted the McCarran Act and its jurisdictional requirements
11 and therefore satisfaction of those requirements is extremely important. Counsel for United States
12 has made it very clear that they require a comprehensive adjudication, and that this means obtaining
13 jurisdiction over all those with water rights. It would be error to proceed to try any issue with the
14 jurisdictional issue remaining open and unresolved. The absence of any indispensable party must be
15 determined before the commencement of the next trial phase rather than in a later proceeding so as
16 not to jeopardize any judgment based upon a lack of jurisdiction or the absence of an indispensable
17 party. (Code Civ. Proc., § 389.)

18 This Court has certified the class of landowners who possess unexercised overlying rights. It
19 likewise appears that the Court is pre-disposed to certify a second class of "small pumpers," i.e.,
20 those landowners pumping less than 25 acre feet of water per year on an average annual basis during
21 the class period. Assuming the two class actions are certified and the classes are properly defined,
22 the service of the class notice will solve most of the jurisdictional problems, but not all of them.
23 There will be a relatively small number of landowners who do not fit either class definition, who are
24 not already party to this suit, or who will opt out of the class actions.

25 In addition, there has not yet been any definitive statement by the plaintiff purveyors that
26 service of process has yet been successfully accomplished on all (or even a significant portion) of the
27 landowners already required to be individually named and served.

1 The remaining landowners not presently before the Court and not within the definition for
2 either or both classes must be served before this case proceeds to trial. Only an express and
3 unequivocal directive from this Court to the purveyor parties to effect service on non-joined
4 indispensable parties will accomplish that objective. That Order must set definitive time limits
5 within which that service of process must be completed. Thereafter, the Court should require that
6 the purveyors certify by declaration, within a set time, that the required service of process has been
7 completed.¹

8 **III. THE COURT'S DETERMINATION ON THE EXISTENCE OF SUB-BASINS**
9 **SHOULD PRECEDE ANY SAFE YIELD OR OVERDRAFT DETERMINATION**

10 The Court has proposed that the next trial phase concern the Basin's characteristics, which
11 may include determinations of the Basin's safe yield and overdraft condition. Some parties to this
12 action contend that the Basin comprises hydrologically distinct sub-basins – such that different areas
13 within the Basin may not be recharged by a common supply. Accordingly, the Court's
14 determination on this issue is critical to the safe yield and overdraft analyses. If the Court
15 determines that the basin is made up of sub-basins, overdraft and safe yield analyses may need to be
16 distinct for each sub-basin. This will necessarily affect the parties' presentations at trial regarding
17 overdraft and safe yield. For this reason, in the Santa Maria case, the Court made its determination
18 as to the existence of sub-basins in the Santa Maria Groundwater Basin in Phase II, which was prior
19 and distinct to its determination on the basin's safe yield and overdraft condition in Phase III.

20 There are differing contentions regarding sub-basins in this case.² For this reason, if the
21 Court plans to consider safe yield and overdraft in Phase II, we recommend that the Phase II trial be

22
23 ¹ The undersigned are hopeful that this issue can be resolved at the CMC. If the Court wishes to
have this matter briefed on a notice motion, counsel for the Wood class will file such a motion
shortly after the CMC.

24 ² See, e.g., First Amended Cross-Complaint of Public Water Suppliers for Declaratory and
25 Injunctive Relief and Adjudication of Water Rights, ¶ 22 ["Various investigators have studied the
Antelope Valley and some have divided the Basin into "sub-basins." According the Public Water
26 Suppliers' information and belief, to the extent the Antelope Valley is composed of such "sub-
basins," they are sufficiently hydrologically connected to justify treating them as a single source of
27 water for purposes of adjudicating the parties' water rights."; Cross Complaint of Tejon RanchCorp,
¶ 10["the western sub-basins of the Antelope Valley Groundwater Basin should either be deemed
28 wholly separate basins from the central and eastern sub-basins, or, if not, the Court should still

bifurcated to begin with a determination on sub-basins and that trial proceed with a determination on safe yield and overdraft only after that sub-basin determination has been made.

**IV. EACH ELEMENT OF THE PURVEYORS' PRESCRIPTIVE RIGHT CLAIMS
MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE**

The proponent of a prescriptive claim bears the burden of proving that claim (*see Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235), and case law makes clear that this is the case in regard to prescriptive water right claims. (*Morgan v. Walker* (1933) 217 Cal. 607, 608, 615; *Hahn v. Curtis* (1946) 73 Cal.App.2d 382, 388-389.) The overdraft condition of a groundwater basin may be an element in an appropriator's establishment of prescriptive rights against overlying owners, assuming all other elements can be proven. Thus the burden of proof is on the purveyors to establish all elements of their prescriptive claims, including, if necessary, the overdraft of the Basin.

As the Court found in Phase III of the Santa Maria Groundwater Adjudication, case law requires that the Purveyors must establish the elements of their prescriptive rights claim by a heightened clear and convincing standard. (See *Weller v. Chavarria* (1965) 233 Cal.App.2d 234; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.) Without clear and convincing evidence of each element of their prescriptive claims – including, if necessary, overdraft – the purveyors will fail to meet their burden of proof of their claim for prescription.

Public policy further demands that the Court consider the consequences of its determination with regard to basin characteristics such as safe yield. In order to make its determination with regard to basin characteristics, the Court will be required to accept or reject numerous assumptions and estimates presented by experts. When deciding whether to accept or reject a given opinion of an expert, the Court should understand the consequences of that decision. The Court may require less rigor for an opinion that has minimal consequences, but should demand a higher level of certainty for an opinion that, if adopted by the Court, may drive numerous small family farms in to

manage them separately in any physical solution and separately adjudicate water rights in the western sub-basins”].

1 bankruptcy. As a part of Phase II, the Court should thus allow parties to offer evidence of economic
2 and social consequences that will result from different determinations made in Phase II.

3 **V. OVERDRAFT**

4 In prior comments by the Court, the Court anticipates the next trial phase to concern
5 “characteristics of the area within the adjudication boundary.” There exists uncertainty among the
6 parties as to what the parameters and scope of Basin characteristics are intended to be for the next
7 phase trial. However, based upon comments made by the Court, the Court may expect to hear
8 evidence concerning the existence and/or non-existence of any historical or present “overdraft.”
9 Likewise, based upon comments made by the Court, it is perceived that the Court does not intend to
10 take evidence concerning the uses of pumped groundwater by any party. It would be error to permit
11 the Purveyors to attempt to establish “overdraft” based only upon the gross aggregate of all
12 groundwater pumping by both Purveyors and overlyers without regard to the limitation imposed
13 upon all water rights by Article X, Section 2 of the California Constitution. The California Supreme
14 Court has stated:

15
16 The Constitutional Amendment therefore dictates the basic principles
17 defining water rights: That no one can have a protectable interest in
18 the unreasonable use of water, and that holders of water rights must
19 use water reasonably and beneficially.

20 (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, at p. 1242.)

21 It would be of little benefit to this Court or any litigant to merely litigate whether or not the
22 aggregate of all pumping presently or historically exceeds and/or exceeded the supply. Ultimately
23 the issue will be whether or not the area within the adjudication boundary was “Constitutionally
24 overdrafted.” That is to say, whether or not the aggregate of all groundwater pumping which was
25 put to a reasonable and beneficial use nonetheless exceeded the available supply. Hypothetically, if
26 we were to assume that the evidence substantiated that:

1. The “safe yield,” the “safe operating yield,” or the “available supply” equaled 100,000 acre feet;
2. The aggregate of all overlying landowner pumping, without regard to method and/or manner of use, equaled 90,000 acre feet; and,
3. The aggregate of all Purveyor pumping, without regard to method and/or manner of use, equaled 20,000 acre feet.

Then, one would presumably conclude that the area was “overdrafted” to the extent of 10,000 acre feet. However, if upon the taking of evidence, the Court were to conclude that collectively, as between both overlyers and Purveyors, 10,000 acre feet of the aggregate of all pumping was put to an unreasonable and/or non-beneficial use, then the area would not be Constitutionally overdrafted. Just as an overlying landowner cannot preserve nor protect the overlying right through self-help to an unreasonable and/or non-beneficial use of water, neither could any Purveyor acquire a prescriptive right to an unreasonable and/or non-beneficial use of water. In the hypothetical, the remedy would be an injunction as against the offending parties, and by that injunction, a restoration of balance.

As observed by the California Supreme Court in *Mojave*, supra, given the mandate of Article X, Section 2, it is now necessary for a trial court to determine whether each water right claimant, is putting the waters to a reasonable beneficial use. In making that determination, consideration must be given to all factors involved, including reasonable methods of use and reasonable methods of diversion. As noted, no water right claimant has a protectable interest in the unreasonable use of water. It is only from a consideration of all uses, that the trial court can then determine whether there is or is not a surplus within the water field available for appropriation. Thus, adherence to the mandate of Article X, Section 2, is a predicate or at minimum a component of determining “overdraft,” a predicate to the existence and/or non-existence of a surplus available for Purveyor appropriation, a predicate to the sustaining of any prescriptive right by quantity, a predicate to the preservation of any overlying right under the doctrine of “self-help,” in short, a significant predicate to a resolution of this litigation.

1 It is recognized that this Court may wish to defer to a later phase, the taking of evidence of
2 the uses for pumped groundwater. Thus, if the Court elects to proceed with the next phase of trial
3 and defer the California Constitution, Article X, Section 2, analysis, then any finding arising out of
4 the next trial phase on the issue of “overdraft,” must be limited to a recognition that if “overdraft” is
5 established based upon the aggregate of all pumping, that the implications and effect of that finding
6 on any parties’ water rights will of necessity have to be deferred until a later phase wherein evidence
7 of use sufficient to facilitate the assessment consistent with the Constitution, Article X, Section 2,
8 analysis can be applied.

9
10 **VI. CONCLUSION**

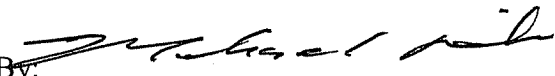
11 In summary, we ask the Court for the following:

- 12 • The Court should order the Purveyors to serve all non-joined parties and certify to the
13 Court that such service has been completed;
- 14 • If overdraft and safe yield are to be considered in Phase II, the Court should bifurcate
15 Phase II in order to make a determination on the existence of hydrologically distinct sub-
16 basins prior to any trial on safe yield and overdraft;
- 17 • The Court should confirm that the purveyors must prove each element of their
18 prescriptive claims by clear and convincing evidence;
- 19 • The Court should allow the presentation of evidence as to the economic and social
20 consequences of its Phase II determinations;
- 21 • The Court should clarify whether it wishes to consider in Phase II any evidence of the use
22 of groundwater pumped from the Basin or defer this issue to a later Phase; and
- 23 • We ask the Court to provide an outline of the key issues it wishes to consider in Phase II.
24 As an example, if the Court wishes to consider the issues of sub-basins, safe yield and
25 overdraft, the Court could propose the following questions:
 - 26 ○ For the purpose of overdraft and safe yield determinations, should the area of
27 adjudication established by the Court in Phase I be regarded as a single
28 hydrologic unit or should it be subdivided into distinct hydrologic sub-basins?

- What was the safe yield of the basin for each year during the purveyors' alleged prescriptive period?
- Was the Basin in a state of overdraft for a period of five consecutive years during the purveyors' alleged prescriptive period?

Dated: July 16, 2008

BROWNSTEIN HYATT FARBER
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By: 

MICHAEL T. FIFE
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ATTORNEYS FOR AGWA

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

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On July 16 2008, I served the foregoing document described as:

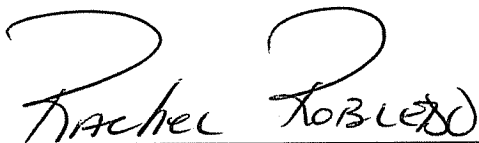
JOINT CASE MANAGEMENT CONFERENCE STATEMENT

on the interested parties in this action.

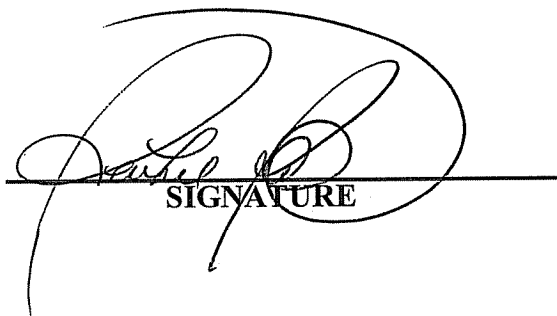
By posting it on the website at 4:45 p.m./a.m. on July 16, 2008. This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on July 16, 2008.



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